IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

WEDNESDAY, THE 24TH JANUARY 2007 / 4TH MAGHA 1928

WP(C).No. 34053 OF 2006(D)

PETITIONER:

M/S.CROWN MARITIME CO.(INDIA) LTD.,
B-320, 32ND CONCORDE, THAKUR VILLAGE SCHEME,
KANDIVALI (EAST) MUMBAI-400 101, REP. BY ITS
CHAIRMAN AND MANAGING DIRECTOR, S.SUJATHAN,
AGED 52 YEARS, S/O.SUKUMARAN.

BY ADV. SRI.S.VENKITESWARAN(SR)
SRI.V.J.MATHEW
SRI.P.P.RAJESH
SRI.BIJISH B.TOM

RESPONDENTS:

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1. THE CHAIRMAN, COCHIN PORT TRUST,
W/ISLAND, COCHIN-9.

2. BOARD OF TRUSTEES, COCHIN PORT TRUST,
W/ISLAND, COCHIN-9, REP. BY ITS CHAIRMAN.

3. CHIEF ENGINEER, COCHIN PORT TRUST,
COCHIN-9.

4. M/S.JAISU SHIPPING CO.PVT. LTD.,
NEAR INDIRA GANDHI BRIDGE, SOUTH END OF
W/ISLAND, COCHIN-3.

5. DHARTHI DREDGING, HYDERABAD,
C/O.COCHIN POST TRUST, W/ISLAND,
COCHIN-9.

(R5 DELETED FROM PARTY ARRAY AS PER ORDER ON I.A. NO. 274/2007 DATED 8.1.2007)

BY ADV. SRI.P.R.RAMACHANDRA MENON
SRI.B.SAJEEV KUMAR
SRI.RAJI T.BHASKAR
SMT.UMARANI.M.N.
SRI.M.K.THANKAPPAN
SRI.ANTONY DOMINIC
SRI.A.M.SHAFFIQUE
SRI.E.K.NANDAKUMAR
SRI.A.K.JAYASANKAR NAMBIAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 12/01/2007, THE COURT ON 24.1.2007, DELIVERED THE FOLLOWING:

WP(C) 34053/2006

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1	THE TRUE COPY OF THE TENDER DOCUMENT NO. NHT - 1358/2006-C WITH THE RELEVANT PAGES.
EXT.P2	THE TRUE COPY OF THE CHARTER PARTY AGREEMENT DATED 24.9.2006 ENTERED INTO BETWEEN THE PETITIONER AND THE OVERSEAS DREDGING RENTAL B.V., NETHERLANDS.
EXT.P3	THE TRUE COPY OF TE LETTER DATED 15.12.2006 ISSUED BY OVERSEAS DREDGING RENTAL B.V. TO THE 3RD RESPONDENT.
EXT.P4	THE TRUE COPY OF THE LETTER DATED 15.12.2006 ISSUED BY THE VESSEL OWNERS/BAGGERMAATSCHAPPIJ BOSKALIS BV TO THE 3RD RESPONDENT.
EXT.P5	THE TRUE COPY OF THE LETTER DATED 14.12.2006 ISSUED BY THE OVERSEAS DREDGING RENTAL B.V (ODR BV) TO THE 3RD RESPONDENT.
EXT.P6	THE TRUE COPY OF THE APPROVAL ISSUED BY THE DIRECTORATE GENERAL OF SHIPPING DATED 1.11.2006.
EXT.P7	THE TRUE COPY OF THE LETTER DATED 28.9.2006 ISSUED BY THE DENA BANK TO OVERSEAS DREDGING RENTAL B.V, WHO SIGNED EXHIBIT P2/CHARTER PARTY.
EXT.P8	THE TRUE COPY OF THE MEMORANDUM OF AGREEMENT DATED 28.4.2006 EXECUTED BETWEEN THE VESSEL OWNER M/S. BOSKALIS BAGGERMAATSCHAPPIJ BOSKALIS BV, NETHERLANDS AND THE PETITIONER.
EXT.P8	THE TRUE COPY OF THE MEMORANDUM OF AGREEMENT DATED 28.4.2006 EXECUTED BETWEEN THE VESSEL OWNER M/S. BOSKALIS BAGGERMAATSCHAPPIJ BOSKALIS BV, NETHERLANDS AND THE PETITIONER.
EXT.P9	THE TRUE COPY OF THE LETTER DATED 15.12.2006 ISSUED BY THE PETITIONER TO THE DY. CHAIRMAN, COCHIN PORT TRUST.
EXT.P10	THE TRUE COPY OF THE LAWYER NOTICE DATED 19.12.2006 ISSUED ON BEHALF OF THE PETITIONER TO THE RESPONDENTS 1 TO 3.

EXT.P11 THE TRUE COPY OF THE LETTER NO. NH/T-1358/2006-C DATED 9.12.2006 ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER.

EXT.P12 THE TRUE COPY OF THE REPLY LETTER DATED 11.12.2006 ISSUED BY THE PETITIONER TO THE 3RD RESPONDENT.

EXT.P13 THE TRUE COPY OF THE EXHIBIT P1 TENDER NOTIFICATION DATED 9.11.2006 CALLED FOR BY THE 3RD RESPODNENT.

EXT.P14 THE TRUE COPY OF THE LETTER DATED 28.12.2006 ISSUED BY DIRECTORATE GENERAL OF SHIPPING TO THE PETITIONER.

EXT.P15 THE TRUE COPY OF THE LETTER DATED 4.12.2006 ISSUED BY OWNER OF THE VESSEL M/S. BAGGERMAATSCHAPPIJ BOSKALIS BV.

EXT. P16 THE TRUE COPY OF THE GUIDELINES ISSUED BY DIRECTORATE GENERAL OF SHIPPING FOR THE GRANT OF LICENSE TO FOREIGN FLAG VESSELS.

EXT.P17 THE TRUE COPY OF THE LETTER DATED 11.12.2006 ISSUED BY STATE BANK OF INDIA TO THE 3RD RESPONDENT.

EXT.P18 THE TRUE COPY OF THE LETTER NO. OBMU/SHIP/06/433 ISSUED BY STATE BANK OF INDIA TO THE 3RD RESPONDENT.

EXT.P19 THE TRUE COPY OF THE CERTIFICATE DATED 11.11.2003 ISSUED BY THE RESPODNENT.

EXT.P20 THE TRUE COPY OF THE CERTIFICATE DATED 16.12.2006 ISSUED BY THE RESPONDENTS.

EXT.P21 THE TRUE COPY OF THE CERTIFICATE DATED 28.6.1999 ISSUED BY THE 3RD RESPONDENT.

EXT.P22 THE TRUE COPY OF THE LETTER DATED 11.12.2006 ISSUED BY THE PETITIOENR TO THE 1ST RESPONDENT.

EXT.P23 THE TRUE COPY OF THE LETTER DATED 28.12.2006 ISSUED BY MERCANTILE MARINE DEPARTMENT TO THE PETITIONER.

EXT.P24 THE TRUE COPY OF THE LETTER NO. NMDP/T-1344/2006-C ISSUED BY THE 3RD RESP0ONDENT TO THE PETITIONER ALONG WITH ANNEXURE.

EXT.P25 THE TRUE COPY OF THE RELEVANT PAGES OF CLAUSE 1.3 OF TENDER NO. NG/T-1358/2006-C DATED 13.11.2006.

EXT.P26 THE TRUE COPY OF THE RELEVANT PAGES OF CLAUSE 4.9.6 OF TENDER NO. NHY/T-1358/2006-C.

EXT.P27 THE TRUE COPY OF THE PLAINT IN O.S. NO. 37/3006 OF THE SUB COURT, KOCHI.

EXT.P28 THE TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE 4TH RESPONDENT HEREIN IN O.S. 37/2006 OF THE SUB COURT, KOCHI.

EXT.P29 THE TRUE COPY OF THE RELEVANT PAGES OF CLAUSE 5,3,2 OF TENDER NO. NH/T-1358/2006-C.

RESPONDENTS EXHIBITS:

EXT.R3(a) TRUE COPY OF THE DETAILS OF CUTTER SUCTION DREDGER, PROPOSED FOR DEPLOYMENT FURNISHED BY THE PETITIONER, TENDER NO. N4/T-1358/2006-C.

EXT.R3(b) TRUE COPY OF THE LETTER DATED 11.12.2006 AND THE CHARTER PARTY AGREEMENT DATED 24.9.2006 (BEING ONE OF THE ENCLOSURE THERETO).

EXT.R3(c) TRUE COPY OF THE AGENDA OF THE MEETING OF THE BOARD OF TRUSTEES DATED 18.12.2006 ALONG WITH ITS ENCLOSURES.

EXT.R3(d) TRUE COPY OF THE LETTER DATED 15.12.2006, FILE NO. CMC/CPT/NH/09, WITHOUT THE ENCLOSURES THERETO, ISSUED BY THE PETITIONER.

EXT.R3(e) TRUE COPY OF THE CHARTER PARTY AGREEMENT DATED 15.12.2006, WHICH WAS SUBMITTED ALONG WITH EXT.R3(d).

EXT.R3(f) TRUE COPY OF THE LETTER DATED 27.11.2006 SUBMITTED BY THE PETITIONER, FILE NO. CMC/CPT-NH/06.

EXT.R3(g) TRUE COPY OF THE REPORT OF THE TECHNICAL EVALUATION COMMITTEE MEETING DATED 5.12.2006.

EXT.R3(h) TRUE COPY OF THE PROCEEDINGS OF THE TENDER COMMITTEE DATED 9.12.2006.

EXT.R3(i) TRUE COPY OF THE MEMORANDUM OF AGREEMENT DATED 28.4.2006 SIGNED BY THE PETITIONER.

EXT.R3(j) TRUE COPY OF THE DREDGING CAPACITY PRODUCED BY THE 4TH RESPONDENTS IN RESPECT OF KAMAL XXVIII

EXT.R3(k) TRUE COPY OF THE DREDGING CAPACITY PRODUCED BY THE 4TH RESPONDENT IN RESPECT OF KAMAL IX.

EXT.R3(l) TRUE COPY OF THE MESSAGE RECEIVED BY THE COCHIN PORT TRUST FROM VIZAG PORT TRUST.

// TRUE COPY //

P.S. TO JUDGE.

knc/-

P.R. RAMAN, J.

W.P.(C) NO. 34053 OF 2006

DATED THIS, THE 24TH DAY OF JANUARY, 2007

J U D G M E N T

Petitioner is a dredging contractor having its registered office at Mumbai. The first respondent is the Chairman of the Cochin Port Trust. The second respondent is a Government Body appointed under the Major Port Trust Act, 1963, the 3rd respondent is the Chief Engineer, Cochin Port Trust.

2. By Ext.P1, the Cochin Port Trust invited tenders from dredging contractors for filling by dredging including side protection by reclamation wall/gravel bund for the embankment formation along the shore side of Moolampilly and Mulavukad for N.F connectivity to Vallarpadam, for which petitioner as well as the 4th respondent submitted their tenders. The tender includes a technical bid and a price bid. M/s. Dharthi Dredging, Hyderabad originally arrayed as the 5th respondent in the writ petition had also submitted a tender, who was, however, disqualified in the pre-qualification bid. He did not, however, challenge the rejection of his bid and subsequently he was removed from the party array as per order dated 12.1.2007 on I.A. No. 274/2007. Petitioner's technical bid was also rejected

by respondents 1 to 3. Since his pre-qualification bid was rejected there did not arise any occasion to open his price bid. According to the petitioner, his pre qualification bid was arbitrarily rejected by respondents 1 to 3 and according to him, he has complied with all the conditions under Ext.P1 technical bid and is confident that he would be the lowest bidder on the price bid also. According to him, the action of respondents 1 to 3 in rejecting his bid on the sole ground that he did not own any Cutter Suction Dredger as provided for in Clause 4.5.4 of Ext.P1 is not justified on any ground, since he clearly satisfied the requirements of Clause 4.5.4. of Ext.P1 which says that the tenderer shall possess by ownership/confirmed chartering agreement, Cutter Suction Dredger of required capacity and he possess the same vide a confirmed charter party agreement, Ext.P2 produced in this case. It is his further contention that clause 4.5.4 of Ext.P1 does not say that tenderer should possess a Cutter Suction Dredger of the required capacity by ownership and it is enough if the tenderer possess the same by a charter party agreement. Even though he possesses such a Dredger of the required capacity by Ext.P2 charter party agreement, respondents 1 to 3 illegally rejected his tender on the ground that he did not possess a Cutter Suction Dredger. It is also contended that respondents 1 to

3 cannot insist that the tenderer should own Cutter Suction Dredger when clause 4.5.4 of Ext.P1 only says that the tenderer should possess the Cutter Suction Dredger under a confirmed chartering agreement. Further, Ext.P4 also show that the owner of the Cutter Suction Dredger, taken on charter by the petitioner had confirmed Ext.P2 charter party agreement. He also satisfied the requirements of clause 4.2.2 (xi) of Ext.P1 by submitting all the documentary evidence regarding ownership of the dredger by charter and also commitment from the vessel owner to make available the vessel for the work as per Exts.P3 and P9. Because of the illegal action of respondents 1 to 3, petitioner contends that, he is put to heavy hardship and hence he seeks for interference of this Court under Article 226 of the Constitution of India, by issuing a writ of mandamus or other appropriate writ directing respondents 1 to 3 not to open and award Ext.P1 tender to the 4th respondent and a further direction to them to accept the tender submitted by him for consideration of his price bid along with the 4th respondent. He also seeks for a declaration that the disqualification of his tender by respondents 1 to 3 is null and void.

3. After filing the writ petition, petitioner filed an additional affidavit dated 20th December, 2006, producing Exts. P11 to P13 documents.

Respondents 1 to 3 filed a counter affidavit dated 21.12.2006 along with Ext. R3(a) to R3(e) documents. Subsequently, petitioner filed a reply affidavit under date 2nd January, 2007. On the same day, respondents 1 to 3 filed an additional counter affidavit along with Ext.R3(g) – a letter dated 27.11.2006 submitted by the petitioner addressing the third respondent. Again, on 8th January, 2007 they filed a second additional counter affidavit along with which they produced Exts. R3(g) to R3(l). A counter affidavit was filed by respondents 1 to 3 as directed by this Court, at the stage of admission. After admitting the matter, they filed the additional affidavits as stated above.

4. The sum and substance of the averments made in the counter affidavits may be summarized and stated as follows: According to Respondents 1 to 3, prior to issuance of Ext.P1 though they have invited tenders on two occasions, both were cancelled. The first tender was cancelled because of the delay in getting environmental clearance from the Ministry of Environment and Forests, Government of India and the second one had to be cancelled as the quoted price was much higher than the probable amount of contract. The work in question is a part of the project for establishment of international Container Transshipment Terminal

(ICTT) and the Port is required to complete the tendered work and hand over the first stretch of embankment to the National Highway Authority of India (NHAI) by July, 2007 because they are contractually bound to their construction contractors, the schedule fixed cannot be further delayed. Because of the cancellation of the previous two tenders, the respondents have lost more than three working months and any further delay may result in loosing further period before the onset of the next monsoon resulting in further overrun in cost and time. Ext.P1 tender was published in leading national dailies besides hosted in the government tender Website and Port Website and the last date for submission of tender was 4th December, 2006. Placing reliance on clause 4.5.4.1 of Ext.P1 tender, it is contended that it was an essential condition of the tender that tenderers shall "possess" by ownership/confirmed chartering agreement, Dredger as specified in the notice. Petitioner, in response to Ext.P1 submitted their tender and along with the technical bid Ext.P8 memorandum of agreement (MOA) between the petitioner and the owner of a Dredger was also enclosed. In the details of the dredger proposed to be deployed for deployment in the work, furnished by the petitioner, along with the technical bid, he had given an undertaking that they have purchased the Cutter Suction Dredger "Gemini"

whereas the document submitted is Ext.P8, a memorandum of agreement to enter into a sale purchase deal and hence the statement in the undertaking referred to above was factually incorrect. Ext.R3(a) is the copy of the details of Cutter Suction Dredger proposed for deployment furnished by the petitioner along with the technical bid. Though the MOA was dated 28th April, 2006, the expected time of delivery was mentioned as "June, 2005". The Technical Evaluation Committee of the Deputy Financial Adviser, Executive Engineer (NM-III) and Assistant Executive Engineer (NM-IB) have evaluated the tender including that of the petitioner and it was thereafter that Ext.P11 letter was issued seeking clarification from the petitioner. Among others, petitioner was also required to furnish documents for the ownership of "Gemini" as per the tender document and to produce details/documents so as to reach the same in the Office of the respondents not later than 11 a.m. on **13.12.2006**. In response to Ext.P11, petitioner, by his letter Ext.R3(b) dated 11.12.2006, produced documents including a Charter Party agreement between himself and M/s. Overseas Dredging Rental BV. Netherlands being the Despondent Owner of the Dredger "Gemini". On receipt of Ext. E.R3(b) and similar clarifications furnished by other tenderers, the matter was again evaluated by the Technical

Evaluation Committee on 13.12.2006 and the report of the said Committee was placed before the Tender Committee consisting of the third respondent, Financial Adviser and Chief Accounts Officer, Secretary and the Deputy Conservator of Port Trust in their meeting held on 17.12.2006. In their meeting held on 17.12.2006, the tender committee recommended that the tender submitted by the petitioner did not meet the qualification criteria. The proceedings of the tender committee, along with the report of the Technical Evaluation Committee and compilation statement were placed before the Board of Trustees in their meeting held on 18.12.2006. Ext.R3 (c) is the agenda of the said meeting. The Board of Trustees granted their approval as sought for in the agenda and in pursuance thereof, the price bid submitted by the pre-qualified tenderer has been opened and is being processed. As per the tender conditions, petitioner and the other tenderer were informed about their disqualification and their price bids were returned. Subsequently, after the expiry of the time mentioned in Ext.P11, petitioner , by Ext. R3(d) letter dated 15.12.2006, submitted another set of documents, Ext.R3(e), which included a charter party agreement. Ext.R3 (d) was received after the expiry of the time and hence there arose no occasion to consider the same. According to them, Ext.P9 has not been

received by the Deputy Chairman as on the date of filing the affidavit. With reference to the averments in para 6 of the affidavit filed by the petitioner that he has got funds sanctioned from Dena Bank and that M/s. Boskalis have agreed to sell the said Dredger, it is stated that it is only an agreement for sale and not actual possession of the dredger by the petitioner as is required as per the tender condition. Even the charter party agreement dated 24.9.2006 is not valid because of the blank columns in the critical area of the document. Thus, petitioner has not satisfied the mandatory tender condition that the tenderer should possess a Cutter Suction Dredger of the required specification by ownership/confirmed chartering agreement and admittedly when the tender was submitted, he was not in possession of such a dredger. Therefore, he was not eligible to be pre-qualified.

5. Referring to Exts.P3 to P5, it is contended that those documents are dated 15.12.2006 and 14.12.2006 respectively and they cannot be taken cognizance of. They justified the decision to disqualify the petitioner.

6. In the reply affidavit filed by the petitioner dated 2.1.2007, petitioner avers that the case of the respondents appears to be that Ext.P2 charter party agreement is incomplete as a reason for disqualification. According to them, the required columns have been duly filled up and the

column providing for time of delivery can be filled up only after awarding the tender and most of the other columns are 'Not Applicable'. Further, according to them, validity of Ext.P2 charter party is clearly proved by Ext.P6 charter hire permission given to Ext.P2 by the Director General of Shipping and the same was also forwarded by the petitioner to the third respondent as per Ext.P12 letter. The said document is conclusive evidence of validity of Ext.P2 charter party. It is further averred that the statement in the counter affidavit that the charter party agreement Ext.P2 and the certificate issued by the Director General of Shipping are contradictory to each other is borne out of ignorance of shipping terms. According to them, in the certificate issued by the Director General of Shipping dated 1.11.2006, the name of the head owner/original owner of the dredger 'Gemini' is stated whereas in the Charter Party Agreement dated 24.9.2006, the name of the despondent owner is stated. despondent owner means a person who is not the head owner of the vessel but a person who has chartered the vessel from the head owner and is sub-chartering the vessel to another person. Further, the despondent owner has all rights for chartering the vessel. Respondents 1 to 3 clearly know that the original/head owner of the vessel is M/s. Baggermaatschappij Boskalis BV, Netherlands as is borne

out from the statement in Ext.R3© and Ext.P8 memorandum of agreement. According to him, thus there is no contradiction in respect of the name of the owner of the vessel and in the documents submitted by the petitioner. Petitioner further avers that the validity of Ext.P2 charter party has been further confirmed by Ext.P14 letter issued by the Director General of Shipping. He also placed reliance on Ext.P15 letter said to have been issued by the owner of the vessel certifying that they had sold dredger "Gemini" to the petitioner. The guidelines issued by the Director General of Shipping for grant of license to foreign flag vessels is produced as Ext.P16. The State Bank of India issued a letter Ext.P17 to evidence the fact that they have already sanctioned credit facilities worth about 18.25 crores to the petitioner. Placing reliance on Ext. P 23, a letter issued to the petitioner by the mercantile Marine Department, petitioner submits that the above letter would show that the dredger "Gemini" is owned by him. According to the petitioner, the 4th respondent to whom some other work was allotted, has not even completed the same against the tender condition and knowing fully the background and lack of infrastructure of the 4th respondent, respondents 1 to 3 are making hasty attempts to award him the tender in question, for which there is no justification.

7. In the additional counter affidavit filed by respondents 1 to 3, apart from denying the averments in the reply, they would state with reference of the scope of the work, that the 4th respondent had a dredger available of the required capacity for deployment, meeting the tender specifications and did not seek any relaxation. According to them, Ext.R3 (e) is yet another charter party agreement and as in Ext.P2 it was blank in several critical areas. It is averred that even according to the petitioner, he did not own or possess a dredger which is a mandatory condition of Ext.P1 tender. The statement that petitioner had purchased the dredger is actually an erroneous statement. In the letter dated 27.11.2006, petitioner had mentioned that they had purchased dredger "Gemini" and had taken delivery of the same. Ext.R3(f) is the said letter. Therefore, it is submitted that the mandatory conditions are not complied with by the petitioner. Exts. P3 to P6 cannot be taken cognizance as they were submitted beyond the time specified in Ext.P11.

8. In the second additional counter affidavit filed by respondents 1 to 3 after reproducing Clause 4.2.2 (xi) it is specifically averred that even the clause deals with documents to be furnished by the tenderer in order to establish the qualification criteria dealt with under Clause 4.5.4.1. It is

their contention that the documents which are furnished by the tenderer in terms of Clause 4.2.2. (xi) should be such as to establish the possession by ownership/confirmed chartering agreement of dredger(s) as stated in Clause 4.5.4.1. They have also extracted the relevant portion of the report wherein the documents submitted by the petitioner are dealt with by the Technical Evaluation Committee at its meeting held on 5.12.2006. The proceedings of the tender committee is Ext.R3(h). It is their contention that at no stage the Port Trust has given up the qualifications criteria laid down in Clause 4.5.4.1 as was attempted to be submitted on behalf of the petitioner. Ext. R3(i) is produced to show that the memorandum of agreement produced as Ext.P8 does not tally with the alleged copy of the same Memorandum of Agreement produced by the petitioner along with another tender which was floated by the Port Trust for a deposit work on behalf of Kochi Refinery Limited. The genuineness of the various documents furnished by the petitioner, therefore, is to be considered in the light of the above aspects.

9. The 4th respondent has also filed a counter affidavit. The summary of the averments contained therein is to the effect that the disqualification of the petitioner as per the proceedings of respondents 1 to 3 is not because of not owning the dredger but for not possessing the same

as contemplated under the relevant clause. The averments of the petitioner and the documents produced according to them would show that petitioner was not in possession of the dredger and that no documentary evidence as to the 'legally binding commitment' from the 'Owner' of the dredger was submitted by the petitioner neither along with the tender nor within the extended time given till 13.12.2006. According to respondents 1 to3 Ext.P8 is nothing but an agreement for sale. The defects pointed out in the technical bid were specifically pointed out by them vide Ext. P11 and in spite of the fact that time was given till 13.12.2006 for curing the same, petitioner could not make use of such opportunity for the obvious reason that he was not in a position to satisfy the requirements. Petitioner, according to them, is not having any consistent case. According to them, petitioner submitted the tender along with Ext.R3(f) letter dated 27.11.2006, stating that he had already purchased the Dredger 'Gemini" and has taken delivery of the same. But Ext.P8 would show that it is only an agreement for sale. Subsequently, petitioner produced Ext.P2 Charter Agreement dated 25.9.2006, executed between himself and the despondent owner which was followed by Ext.P4 letter dated 15.12.2006 issued by the original owner, confirming the authority of the despondent owner in

executing Ext.P2 agreement. But in the reply affidavit filed by the petitioner, he has stated that the original owner has issued Ext.P15 letter dated 4.12.2006 to the effect that he had already sold the Dredger 'Gemini" to the petitioner. If it was true, there was absolutely no need or occasion for having executed Ext.P4 dated 15.12.2006 by the very same owner suppressing the alleged sale. They also denied the averments made in para 3 of the additional affidavit filed by the petitioner. It is further contended, with reference to Ext.P6 sanction issued by the Director General of Shipping, that permission was given for the work in 'Hajira', Port on Gujarat coast, making it clear that it will be valid only for a period of 90 days in Lay can on 15.11.2006. By issuing Ext.P14, the Directorate General of Shipping has only reiterated the said fact and it has not granted any extension, nor has it changed the date of Lay can shown as 15.11.2006. The effect is that the Dredger ought to have been at Hajira on 15.11.2006 and if it is not there on that day, the permission will stand cancelled as per Clause 5(1) © of Ext.P16 guidelines, which will make the petitioner to apply as a fresh one following the procedure from the beginning once again as stipulated under Clause 5(1)(e). The enquiry made by the 4th respondent has revealed that the Dredger Gemini is presently located within the

Chiottagong Port Area in Bangladesh even as on 17.12.2006 and as such it was never in Lay can at Hajira on 15.11.2006 as stipulated in Ext.P6 sanction issued by the Director General of Shipping. Thus, the petitioner has never possessed the Dredger at any time for entertaining the work. Reliance was placed on the decision reported in **Laxmi Sales Corpn. v. Bolangir Trading Co. (2005)3 SCC 157)** to contend that production of document as per tender condition is mandatory.

10. In the reply affidavit filed by the petitioner thereto, it is averred that he had complied with Clause 4.5.4 of Ext.P1 tender condition by producing a confirmed charter party agreement and as per clause 4.4.2 (xi) he had produced legally binding commitments from the owners for making available the dredger for work. According to him, the charter party was entered into between himself and the despondent owner of the dredger to mitigate the loss suffered by the owner of the vessel from the date of agreement for sale till the date the flag and registration of vessel is changed.

11. In the second reply affidavit filed by the petitioner, they have produced Exts. P24 to P29, probably to support the earlier contention against the 4th respondent that he has not completed the earlier project work

awarded by respondents 1 to 3.

12. I have heard the arguments of the learned senior counsel Sri. S. Venkiteswaran appearing on behalf of the petitioner and the learned senior counsel Sri. P.K. Kurian appearing on behalf of respondents 1 to 3 and the learned counsel Sri. P.R. Ramachandra Menon appearing on behalf of respondent No.4 and perused the affidavits and materials produced in the case.

13. The first prayer made in the writ petition is for a direction to respondents 1 to 3 not to open and award Ext.P1 tender to the 4th respondent in the writ petition. The writ petition came up for admission on 20.12.2006. the respondents, in para 7 of in their counter affidavit filed on 21.12.2006, have averred that the Board of Trustees, in its meeting held on 18.12.2006 had granted their approval as sought for in the agenda and in pursuance thereof the price bid submitted by the pre-qualified tenderer had been opened and is being processed. As such the prayer for a direction not to open the tender has become infructuous. What remains for consideration is the latter direction sought for namely, to consider the price bid submitted by the petitioner after declaring rejection of his pre-qualified bid as illegal.

14. Being a contractual matter, the jurisdiction of this Court under

Article 226 of the Constitution of India is limited and the only question to be considered is whether the rejection of the pre-qualification bid submitted by the petitioner is arbitrary and violative of Article 14 of the Constitution of India.

15. This Court being not an appellate forum cannot substitute its on views to that of the awarder even if two views are possible. Unless the view taken by the authorities are actuated by any mala fide intention or the rejection is totally erroneous and capricious there may not arise an occasion for this Court to interfere . It is not necessary to multiply with decisions on this point. However, I wish to refer a few decisions on the point. In **Reliance Airport Developers Pvt. Ltd. v. Airport Authority of India** (2006(10) JT 424) at page 463 in para 66 the apex court held as follows:

> "One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial in nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary."

In the same decision in para 69, it was held as follows:

> "The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above; like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient."

Further, in para 75 it was held thus:

> "In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself."

Reference was made to the decision in **Indian Railway Construction Co. Ltd. v. Ajay Kumar** (JT 2003(2) SC 295). It was held that in the realms of contract, various choices were available. Comparison of the respective merits, offers of choice and whether that choice has been properly exercised are the deciding factors in the judicial review. It is observed in para 91 of the said decision as follows:

> "It is pointed out by learned counsel for the respondents that parameters for judicial review are different in the matters of contract for normal case of tenders. In case of commercial contracts the normal contractual matters are excluded. It is pointed out that there is no overwhelming public

> interest involving such matters. GETE had only touched the fallacious approach of EC to make the process transparent. The view taken is a possible view supported by reasons and there should not be any interference.
>
> In the ultimate, the question would be whether in the process of selection the Government had adopted transparent and fair process.
>
> While balancing several claims a rational approach is necessary and that is to be formed in line with the scope of judicial interference."

In **Tata Cellular v. Union of India** (1994) 6 SCC 651) the apex court held thus:

> "The duty of the court is thus to confine itself to the question of legality. Its concern should be:
>
> 1. Whether a decision - making authority exceeded its powers?
> 2. Committed an error of law,
> 3. committed a breach of the rules of natural justice,
> 4. reached a decision which no reasonable tribunal would have reached or,
> 5. abused its powers.
>
> Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly

> put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:
>
> (i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
>
> (ii) Irrationality, namely, Wednesbury unreasonableness.
>
> (iii) Procedural impropriety.
>
> The above are only the broad grounds but it does not rule out addition of further grounds in course of time. "

In **Joseph Thomas v. Supdt. Engineer** (2003(3) Case No. 93) I had occasion to consider the question as to when in the matter of awarding of contract could be interfered with and it was held that the Government contract tenders must be in consonance with Article 14 and only the decision making process and not the merits of the decision itself is reviewable as court does not sit as appellate court while exercising power of review. The principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness of favoritism. Since the power of judicial review is not an appeal from the decision the Court cannot substitute its own decision.

17. The legal position has thus been discussed. I shall now deal with

the contentions on merits.

18. Ext.P1 contains the terms and conditions of the tender. Sealed tenders are invited for "filling by dredging including side protection by rubble mound reclamation wall/gravel bund for the embankment formation along the shore side of Moolampilly and Mulavukad for NH connectivity to Vallarpadam". As per Clause 4.2.1. the tender has to be submitted in two covers in separate sealed envelopes superscribed with tender number, due date and name (Technical bid or Price bid) as detailed in the subsequent clause.. Cover A, Technical Bid should contain EMD and all technical and commercial details except priced schedule of quantities, duly signed on all pages. Cover B, Price Bid should contain only schedule of quantities for the work with rates quoted, amounts etc. duly filled in and signed on all pages. Clause 4.2.2. specifies list of documents to be included under cover A and B. The contents of Cover A2, among other things by virtue of clause (x) thereunder should contain the details such as number of dredgers, dredging capacity, type and other salient features of the dredgers proposed to be deployed for the work, availability of the dredgers at command for deployment on the work etc. The relevant clause dealing with the document to be produced in particular on which both sides placed reliance to support

their respective contentions are clause 4.2.2 (xi) which reads as follows:

> "Documentary evidence of the ownership of the dredger(s) or legally binding commitment from the owner of the dredger(s) for making available the same for the work."

19. Two other clauses which are also relevant to be noticed in the context of the case are Clauses 4.3.1 and 4.5. Clause 4.3.1 which deals with pre bid meeting, reads as follows:

> "A pre-bid meeting will be held in the Chief Engineer's Chamber of Cochin Port Trust at 11 A.M. on 20th November, 2006. Attendance at pre-bid meeting is strongly advised. Should there be any discrepancy in or any doubt or obscurity as to the meaning of any of the tender documents or as to anything to be done or not to be done by the tenderers or any clarification or if any additional information is needed by the tenders, these shall be set forth in writing and submitted to the Chief Engineer, well in advance of the date fixed for the pre bid meeting."

Clause 4.5 deals with the qualification criteria of which what is relevant for the purpose of this case is Clause 4.5.4, which reads as hereunder:

> "The tenderer shall possess by ownership/confirmed chartering agreement, Cutter Suction Dredger(s) of total filling capacity not less than 500 cu.m/hour, for deployment on the work. No dredger with filling capacity less than 250 cu.m/hour shall be allowed on the work and reckoned for the above purpose."

20. There is no dispute that the last date for submitting the tender was on 4.12.2006. The tenders were opened on 4.12.2006. Along with the technical bid petitioner submitted Ext.P8 memorandum of agreement dated 28.4.2006, which is an agreement between the petitioner and the owner of the drudger, for sale of a Cutter Suction Dredger by name Gemini for a purchase price of 2,300,000 U.S. Dollars. As per Clause 3 of the said agreement, purchase price has to be paid in full free of bank charges on signing Ext.P8 agreement and the protocol of delivery and acceptance to Seller's bank account in the ABN-AMRO Bank in Ronerdam Account No. 44,30.03.602 or optional 50% at signing the agreement and the other 50% shall be paid by first class bank guarantee. As per Clause 5 (b) the vessel and all other equipments shall be delivered and taken over safely afloat at a safe and accessible berth or anchorage at/in Chittagong at Port of Convention to the Buyers within Port Limits, after Export documentation is completed or elsewhere to be agreed in the sellers option. The date of

cancellation is four weeks after date of this agreement. As per Clause 5(c) if the sellers anticipate that notwithstanding the exercise of due diligence by them, the vessel will not be ready for delivery by the canceling date they may notify the buyers in writing stating the date when they anticipate that the vessel for delivery and propose a news canceling date upon receipt of which the buyers shall have the option of either canceling the agreement within seven running days of receipt of the notice or of accepting the new canceling date. As per Clause 17, it is for the buyers to organize the transport of the vessel from Chittagong, Bangladesh to India, including all costs for buyers' account.

21. This is a document computorily generated copy of "Saleform 1993", printed by authority of the Norwegian Ship brokers' Association. There is an addendum to the memorandum of agreement dated 28th April, 2006 which forms integral part thereof regarding the auxiliary equipment and spare part of Gemini spare part enclosed therewith. According to the petitioner, Clause 4.5.4 only shows that tenderer shall possess by ownership or confirmed charter party agreement the cutter suction dredger of the required capacity and he possesses a cutter suction dredger by name Gemini by a charter party agreement. Ext. P2 is a true copy of the charter

party agreement. Column 16, which provides for time for delivery, is left blank. The place of delivery mentioned in Column 15 is Hazira, India. This is the charter party agreement between the Overseas Dredging Rental BV Netherlands in favour of Crown Maritime Co.(I) Ltd. This is issued at Netherland on 24.9.2006.

22. Admittedly, Exts.P8 and P2 are not issued by the same party. But according to the petitioner, Ext.P2 was issued by the despondent owner and the vessel owner has issued Ext.P8. It was contended on behalf of the respondents that by Ext.P8 if the vessel had already been sold to the petitioner on 28th April, 2006, there was no occasion for the despondent owner to issue Ext.P2 charter party agreement and in such circumstances, there cannot be a confirmed sale as per Ext.P8 in favour of the petitioner. By Ext.P11 dated 9.12.2006, the Cochin Port Trust informed the petitioner that on perusal of his technical bid opened on 4.12.2006, it is observed that the technical bid and commercial conditions stipulated in the tender listed thereunder are not acceptable and have to be withdrawn. As per para 2 of the letter, documentary evidence for the ownership/confirmed chartering agreement of the dredger Gemini are to be furnished as per Clause 4.2.2 (xi) and Table-4 of the Department Tender Document and the petitioner was

required to furnish the details of the documents required under Clause 2 to 4 so as to reach their office not later than 11 A.M. on 13.12.2006. The reply thereto submitted by the petitioner is Ext.P12 and the true copy of Ext.P1 tender Notification dated 9.11.2006 called for by the third respondent is produced as Ext.P13. Ext.P12 is dated 11th December, 2006. Petitioner has enclosed a charter party agreement of the dredger 'Gemini', charter higher permission from the Director General of Shipping and the funds transferred by way of remittance of US $8,50,000/- for the mobilization of the dredger Gemini. According to the petitioner, the company has obtained permission for remittance for charter hire till the dredger is mobilized in India prior to that the company has entered in a sale & purchase agreement for transferring the said cutter suction dredger Gemini into Indian Flag to avoid paying charter hire and save foreign currency. They have also enclosed the experience certificate, financial stability certificate etc. An undertaking is also given. The respondents have also produced the same letter as Ext.R3 (b). The charter hire permission from the Director General of Shipping is Ext.P6. Subsequently, the documents produced as per Ext.P12 along with similar clarifications issued by other tenderers came up for evaluation by the technical evaluation committee on 13.12.2006 and the same was evaluated

and a report submitted, which again came up for consideration before the tender committee. Proceedings of the tender committee is produced as Ext.R3(h). The report of the technical evaluation committee was after consideration of the tenders and also comparing the statement furnished by the tenderers. The observations of the tender committee as respect to the petitioner is contained in para 3 of that document which reads as follows:

> "They propose to carry out the filling work by direct pumping deploying cutter suction dredger 'GEMINI'. They produced Memorandum of Agreement between the Baggermaatschappij Boskalis bv, the owner of dredger 'GEMINI' and Crown Maritime on the sale purchase of the dredger 'GEMINI'. The document shows the process of purchase, but does not indicate ownership of the dredger. They also submitted a Charter Party Agreement between Overseas Dredging Rental B.V. as desponent owner of 'GEMINI' and Crown Maritime. But the agreement is incomplete without mention of date of delivery or commitment. Even the documents submitted has several contradictions, for example, the MOA dated 28.4.2006, states that the expected time of delivery would be June, 2005. Although, sufficient opportunity was given to the party to produce documentary evidence to prove ownership/confirmed chartering agreement, the party did not comply till date. Thus, this bidder has failed to comply with the qualification criteria under clause 4.5.4.1 of tender document."

23. Now let me consider whether the said reason of the tender

committee could be considered as arbitrary. Going back to the document Ext.P8, it is only an agreement for sale and the goods is in the process of purchase. Admittedly it cannot be construed as a document to show that petitioner has become an absolute owner of the dredger. Otherwise there was no occasion for the petitioner to produce a charter party agreement Ext.P2 signed between the despondent owner and the petitioner. If the ownership or the dredger has already vested with the petitioner, there arise no occasion for a charter party agreement by the despondent owner with the petitioner on a later date as evidenced by Ext.P2. Learned counsel appearing on behalf of the petitioner contended that in case there is a failure to comply with the conditions in Ext.P8 serious consequences including penal charges would be liable to be paid by the seller. Consequences apart, the fact remains that on his own showing Ext.P8 cannot be said to be a document evidencing the ownership of the dredger. Therefore, the technical evaluation committee cannot be faulted on the basis of this reasoning and at any rate, their decision cannot be said to be arbitrary on this account.

24. The next is the document Ext.P2, the charter party agreement between the despondent owner and the petitioner. As I have already observed Column 16 which provides for the time of delivery is left blank

and the place of delivery is shown as Hazira, India. Therefore, the technical evaluation committee was right in their conclusion that this charter party agreement is incomplete without mentioning the date of delivery. Further, even in Ext.P8 the expected time of delivery is shown as June, 2005. This may be a mistake since the Memorandum of Agreement is dated 28.4.2006. But the petitioner did not chose to rectify this defect at any time before 13.12.2006. These being the only documents produced before the cut off date 13.12.2006 and since the decision of the technical evaluation committee and rejection of the technical bid by respondents 1 to 3 is based on a consideration of the documents produced before the cut off date, there arises no occasion for consideration of any other documents produced later in point of time and this Court can only consider the matter based on the documents produced before the cut off date in drawing its conclusion.

25. Now the only question that remains to be considered is whether the provision contained in Clause 4.2.2 read with Clause 4.5.4 is complied with by the petitioner and what is intended by these clauses. As per Clause 2.2.2 (xi) as already extracted above, the ternderer has to produce documentary evidence of the ownership of the dredger or legally binding commitment from the owner of the dredger for making available the same

for the work. Clause 4.5.4 stipulates that tenderer shall possess by ownership/confirmed chartering agreement, Cutter Suction Dredger of total filling capacity not less than500 cu. m./hour, for deployment on the work. A conjoined reading of these clauses would show that defacto possession of the dredger at the time of submitting technical bid is not insisted upon. At the same time, it has to be ensured by the tenderer and satisfy the awarder that the tenderer shall possess the dredger either as owner or by confirmed chartering agreement as the case may be. So that the awarder could rest assured that the dredger will be available for the work. As regards the ownership of the dredger is concerned, I have already dealt with the same and found that Ext.P8 does not evidence ownership of the dredger by the petitioner. Of course, if the petitioner produced a charter party agreement showing the legal binding commitment from the owner so as to make available the same for the work it will satisfy the requirement provided for in Clause 4.2.2(xi) of Ext.P1. But then, column 16 which provides for the date of delivery, which is a crucial clause to show as to when will such dredger will be available for work, is left blank and the petitioner, in such circumstances, cannot be said to have satisfied the condition as mentioned above. The contention of the petitioner that by the documents Exts. P8 and

P2 he satisfied the stipulations imposed under Clause 4.2.2(xi) read with Clause 4.5.4 of Ext.P1 is therefore unacceptable. The rejection of the tender for the reasons as stated by the Technical Evaluation Committee and referred to above cannot be said to be arbitrary.

In the circumstances, the relief sought for cannot be granted in exercise of the power under Article 226 of the Constitution of India. The writ petition is accordingly, dismissed.

P.R. RAMAN,
(JUDGE)